UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUL 16 2014

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

The Honorable Katherine Hammack
Assistant Secretary of the Army for Installations,
Energy and Environment
Office of the Assistant Secretary of the Army
110 Army Pentagon, Room 3E464
Washington, DC 20310-0110

Re: RCRA Section 7003 Unilateral Administrative Order, U.S. EPA Docket Number RCRA-06-2014-0902, Explo Systems, Inc. Site, Camp Minden, Louisiana

Dear Ms. Hammack:

On March 18, 2014, the United States Environmental Protection Agency (EPA) issued a Unilateral Administrative Order (UAO) to the United States Department of the Army under the authority of Section 7003 of the Resource Conservation and Recovery Act (RCRA), which requires the Army to eliminate the imminent and substantial endangerment posed by the 15 million pounds of M6 propellant stored at the former Explo Systems, Inc. site at Camp Minden, Louisiana.

Cleaning up and properly disposing of the hazardous materials at this site is the Army's legal and civic responsibility, and failing to comply threatens the health and safety of communities around Camp Minden. At least one explosion has already occurred at this highly volatile location, which has been under a Louisiana "State of Emergency" proclamation. At one point, the surrounding community was forced to evacuate.

EPA determined, in its March Order, that the Army has contributed to or is contributing to the past or present handling, storage, and/or disposal of solid waste and/or hazardous waste that may present an imminent and substantial endangerment to health or the environment. Specifically, the actions and the lack of oversight by the Army contributed to the improper handling and storage of approximately 15 million pounds of M6 propellant. The improper storage and handling increased the rate of the degradation of the stabilizers in the M6 propellant and compromised propellant lot integrity. The M6 propellant became a solid waste when it accumulated onsite and was not actively being recycled, and as a result of its improper handling

and storage. In addition, once the M6 propellant had accumulated for a sufficient length of time to be considered discarded, subsequent shipments of the artillery charges to Explo are considered discarded and therefore a solid waste. There is an imminent and substantial risk that the M6 propellant (which is stored in proximity to 3 million pounds of other explosives) may auto-ignite, and cause a substantial explosion. Further, the probability of a more substantial explosion is greatly increased if the M6 propellant is left in storage and not addressed within the time specified in the UAO.

At your request and as provided under RCRA, we conferred about EPA's Order in May of 2014. At that meeting, and in subsequent written submissions, you provided the Army's views on EPA's Order. EPA has carefully reviewed and fully considered the Army's legal and factual submissions, and I have fully considered them in making my decision.

After full and fair consideration of the points raised by the Army in the conference and written materials, I conclude that the management of hazardous and solid waste at Camp Minden may present an imminent and substantial endangerment, and that the Order issued is necessary and appropriate to abate the endangerment. A more detailed EPA response to the Army's objections to this Order is provided in the enclosure.

Pursuant to Paragraph 149 of the Order, the Order shall become effective within five (5) calendar days of your receipt of my decision. Then, pursuant to Paragraph 143 of the Order, the Army must notify EPA in writing of its intent to comply with the Order no later than five (5) calendar days after its effective date. EPA stands ready to work with the Army and all responsible parties to ensure a timely and protective cleanup of the contamination at Camp Minden.

Sincerely,

Cynthia Giles

Cynthia Giles
Assistant Administrator

Enclosure

cc: Ron Curry

ENCLOSURE

EPA RESPONSE TO ISSUES RAISED BY THE U.S. ARMY
RE: OPPORTUNITY TO CONFER
RCRA SECTION 7003 UNILATERAL ADMINISTRATIVE ORDER
U.S. EPA DOCKET NO. RCRA-06-2014-0902

I. Background and Procedural History

On March 18, 2014, the United States Environmental Protection Agency (EPA) issued a Unilateral Administrative Order (UAO) to the United States Department of the Army under the authority of Section 7003 of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6973. The UAO requires the Army to eliminate the imminent and substantial endangerment posed by the 15 million pounds of M6 propellant stored at the former Explo Systems, Inc. (Explo) site at Camp Minden, Louisiana. EPA determined that the Army has contributed to or is contributing to the past or present handling, storage, and/or disposal of solid waste and/or hazardous waste that may present an imminent and substantial endangerment to health or the environment. Specifically, the actions and the lack of oversight by the Army contributed to the improper handling and storage of approximately 15 million pounds of M6 propellant. The improper storage and handling increased the rate of the degradation of the stabilizers in the M6 propellant and compromised propellant lot integrity. The M6 propellant became a solid waste when it accumulated onsite and was not actively being recycled, and as a result of its improper handling and storage. In addition, once the M6 propellant had accumulated for a sufficient length of time to be considered discarded, subsequent shipments of the artillery charges to Explo are considered discarded and therefore a solid waste. There is an imminent and substantial risk that the M6 propellant (which is stored in proximity to 3 million pounds of other explosives) may auto-ignite, and cause a substantial explosion. The probability of a substantial explosion is greatly increased if the M6 propellant is left in storage and not addressed within the time specified in the UAO.

The Army received a copy of the UAO by mail on March 27, 2014. As such, the deadline for requesting a conference with the EPA Assistant Administrator for Enforcement and Compliance Assurance (EPA Assistant Administrator) was April 7, 2014. On March 28, 2014, the Army requested an extension of eight days until April 15, 2014, to respond to the UAO. EPA granted the request for extension. On April 15, 2014, EPA received a copy of the Army's Response via e-mail. In the Response, the Army requested that EPA withdraw the UAO, claiming that it is based upon inaccurate factual findings and the misapplication of the laws governing Army procurement actions and hazardous waste. In addition, the Army requested an opportunity to confer with the EPA Assistant Administrator regarding the Army's objections. The meeting with the EPA Assistant Administrator was held on May 19, 2014. The Army requested a second conference with the EPA Administrator on May 29, 2014. EPA denied this request in a letter dated June 24, 2014. The Army also raised a number of objections in its Response. EPA's responses to the Army's objections are set forth below.

II. The Anti-Deficiency Act is Not a Bar to this Action

The Army argues that compliance with the UAO would violate the Anti-Deficiency Act because the Army possesses no fiscal authority to provide funds to conduct work described in the UAO. The Army claims that the Defense Environmental Restoration Program (DERP), 10 U.S.C. § 2700 *et seq.*, only authorizes the Department of Defense (DoD) to conduct environmental response actions at "a facility or site owned by, leased by, or otherwise possessed by the United States and under the jurisdiction of the Secretary", or at a "facility or site which was under the jurisdiction of the Secretary and owned by, leased to, other otherwise possessed by the United States at the time of actions leading to contamination. . . ."[1] The Army argues that because the United States does not currently own, lease, or otherwise possess Camp Minden, nor did the United States own, lease, or otherwise possess Camp Minden when the M6 propellant was improperly stored, there is no authority to use appropriated funds for the purposes set forth in the UAO. Army Response at 6 – 7.

The UAO does not direct the Army to use any particular appropriation or fund to implement work required by the UAO. Consequently, the UAO does not require the Army to do anything that would violate the Anti-Deficiency Act. If the Army determines that it is not able to use the Environmental Restoration Account, then a more general appropriation may be available. Finally, if the Army is unable to use an existing appropriation, it must seek authorization and appropriation from Congress to perform the actions required by the UAO.

III. All Required Elements to Issue a RCRA Section 7003 Order Have Been Met

This UAO was issued pursuant to Section 7003 of RCRA, 42 U.S.C. § 6973. Section 7003 of RCRA, 42 U.S.C. § 6973(a) provides the following:

> Notwithstanding any other provision of this chapter, upon receipt of evidence that the past or present handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment, the Administrator may bring suit on behalf of the United States in the appropriate district court against any person (including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility) who has contributed or who is contributing to such handling, storage, treatment, transportation or disposal to restrain such person from such handling, storage, treatment, transportation, or disposal, to order such person to take such other action as may be necessary, or both. . . The Administrator may also . . . take other action under this section, including, but not limited to, issuing such orders as may be necessary to protect public health and the environment.

[1] 10 U.S.C. §§ 2701(c)(1)(A) and (B).

The Army argues that none of the three elements necessary under Section 7003 of RCRA to attach liability to the Army have been established. Army Response at 7. The elements necessary to establish a *prima facie* case of liability under Section 7003 of RCRA, 42 U.S.C. § 6973 are as follows:

> A. Conditions exist which present or may present an imminent and substantial endangerment to health or the environment;
> B. The potential endangerment stems from the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste; and
> C. The person[2] has contributed or is contributing to the handling, storage, treatment, transportation, or disposal of solid or hazardous waste.

United States v. Aceto Agricultural Chemicals Corporation, 872 F.2d 1373, 1382 (8th Cir. 1989). The Army also argues that even if an imminent and substantial endangerment may be present, the material was not a solid waste, nor has the Army "contributed to" the handling of solid waste at the Explo leased area on Camp Minden. Army Response at 7. The Army's specific arguments are addressed below.

A. An Imminent and Substantial Endangerment Exists at Camp Minden

The Army admits in its Response that over the course of ten years, there is an increased risk of "auto-ignition" of the M6 propellant stored at Camp Minden. Army Response at 7. The Army claims that based on the April 18, 2013 and the June 13, 2013 Reports, that "with proper stability monitoring, the materials could be stored for several years without an 'explosive event'", and that "there was a minimal chance for ignition (not explosion) within two years and a somewhat higher chance for ignition within two to ten years as the stabilizers degrade over time." Army Response at 5. The Army also alleges that prior to moving the M6 propellant to the magazines, the Louisiana State Police (LSP) tested the M6 propellant and did not find any unstable propellant. Army Response at 5. Therefore, any endangerment from the M6 propellant is remote, and can be mitigated with proper stability monitoring by the Louisiana Military Department (LMD). Army Response at 7. Thus, the Army does not dispute that an endangerment exists or that the endangerment is substantial.[3] It only argues that the endangerment is not imminent.

Courts have interpreted the term "imminent and substantial endangerment" very broadly. As stated in *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199 (2nd Cir. 2009), the

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[2] The definition of person in Section 1004(15) of RCRA, 42 U.S.C. § 6903(15) includes departments of the United States. The Army, as a department of the executive branch of the Federal Government, is subject to the requirements of Section 6001 of RCRA, 42 U.S.C. § 6961, is therefore subject to the liability under Section 7003 of RCRA, 42 U.S.C. § 6973.

[3] An "endangerment" is defined as a threatened or potential harm and does not require proof of actual harm. *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 211 (2nd Cir. 2009). An endangerment is substantial if it is serious. *Id.* at 210.

> imminent and substantial endangerment standard is a broad one. Significantly, Congress used the word "may" to preface the standard of liability: "present an imminent and substantial endangerment to health or the environment." This is expansive language, which intended to confer . . . the authority to grant affirmative equitable relief to the extent necessary to eliminate *any risk* posed by toxic waste.

Id. at 210 (emphasis in original). Courts have also held that a

> finding of imminency does not require a showing that actual harm will occur immediately so long as the risk of threatened harm is present. Nonetheless, liability under 42 U.S.C. § 6972(a)(1)(B)[4] is not limited to emergency-type situations, and a finding of imminency does not require a showing that actual harm will occur immediately.

Id. (internal citations and quotation marks omitted). In fact, "an endangerment is 'imminent' *even though the harm may not be realized for years.*" *United States v. Conservation Chemical Company*, 619 F.Supp. 162, 194 (W.D. Mo. 1985) (emphasis added).

Using the above criteria, the Army's own documents show that the endangerment posed by the M6 propellant is "imminent". For example, on April 2 – 3, 2013, a technical assistance team from DoD and the Army visited Camp Minden, and issued a Report dated April 18, 2013. The Report stated the following:

> The preponderance of evidence indicates that the probability of an explosives event directly related to the long-term storage of M6 propellant at Minden is likely. That is: (a) anecdotal evidence indicates that the "kicker boxes" of propellant may contain multiple Lots, instead of the single Lot number indicated on the "blue" labels; (b) due to the unknown storage conditions for M6 propellant after its removal from the propellant charge cans, the propellant's stability cannot be guaranteed; and (c) the bulk packaging (white bag, fiber drum or cardboard box) is not a standard packaging method for long-term storage of M6 propellant. The use of such bulk packaging may (a) not prevent the loss of stabilizer; (b) allow moisture intrusion; and (c) increase nitro-cellulose decomposition rates. These factors, combined with nitro-cellulose's ability to auto-ignite, increase the probability of a detonation within a storage structure at Camp Minden within 10 years.[5]

On May 7 – 9, 2013, a technical assistance team from DoD and the Army visited Camp Minden again, and issued a second Report dated June 13, 2013. This Report stated the following:

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[4] 42 U.S.C. § 6972(a)(1)(B) is the citizen suit corollary to Section 7003 of RCRA, 42 U.S.C. § 6973.

[5] Report at 16 (emphasis added).

> Low stability content can result in auto-ignition of propellant in storage, causing a detonation. At Camp Minden, Explo's operations appear to have resulted in the loss of lot identity for the M6 propellant that Explo has in storage. Explo's packaging configurations (e.g., incorrect lot markings on containers and outer-packs, multiple markings); storage procedures, which exposed some of the packaged propellant to the environment; and packaging process, which may have mixed lots led the technical assistance visit team to conclude that lot identity was, at a minimum, questionable. Explo did not have a propellant stability monitoring program in place. Although the transfer of M6 propellant to earth covered storage has reduced the risk to public safety, an explosive event (i.e., a detonation) from auto-ignition is very possible without a propellant stability monitoring program in place to track the propellant's stabilizer content and address potentially unstable propellant.[6]

Both Reports conclude that the probability of a detonation (explosive event) of the M6 propellant from auto-ignition due to the storage conditions and unknown stability of the M6 propellant is likely. During a meeting with EPA on August 1, 2013, a DoD representative of the Army's Technical Assistance Visit Team indicated that the likelihood of a *magazine explosion* occurring was in the range of two to ten years due to instability concerns resulting from improper storage exposing the propellant to heat and moisture and loss of lot integrity and identification. UAO ¶ 49 (emphasis added). Chemical ingredients known as stabilizers are added to the M6 propellant during manufacturing to prevent auto-ignition during the useful life of the M6 propellant. The stabilizers degrade or deteriorate over time, and exposure to heat and humidity accelerates the degradation or deterioration of the stabilizers. The degradation of the stabilizers will continue as long as the M6 propellant remains in storage. The M6 propellant was also not properly packaged for long term storage. Unstable lots of explosives may be located in many of the 97 magazines.[7] Thus, the likelihood of an explosion within one or more of the 97 magazines containing the 18 million pounds of explosives increases each day. Therefore, the evidence from the Army shows that the threat is imminent.

The Army claims that implementing a stability monitoring program is technically feasible and any endangerment from the M6 propellant is remote and can be mitigated with proper

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[6] Report at 5 (emphasis added).

[7] A lot of approximately 21,000 pounds of M6 propellant was identified as Stability Category "C", which indicates that it is approaching a potentially hazardous stability condition. The Army recommended that this lot be disposed of as soon as possible. The lot was destroyed in April – May 2013.

stability monitoring.[8] However, as noted in Section III.B, since there are no buyers for the M6 propellant accumulated at Camp Minden, the M6 propellant could be stored indefinitely and the imminent risk of an explosion would remain. Furthermore, implementing a stability monitoring program under the conditions that exist at Camp Minden involves significant risks. As noted in Paragraph 58 of the UAO, the storage of the M6 propellant in the magazines does not comply with applicable safety regulations and practices. Many of the boxes containing the M6 propellant are damaged and/or crushed. There is no aisle space in many of the magazines. Containers are placed directly against interior walls, in violation of 27 C.F.R. § 555.214(a). Implementing a stability monitoring program under these conditions would expose workers to unnecessary risks. Due to the loss of lot integrity, a significant number of samples would have to be taken, and that sampling repeated at a specified interval in order to properly establish stabilizer content levels. Such sampling would further increase the explosion/auto-ignition risk due to the number of samples and sampling methods needed. Moving containers of damaged and improperly stored M6 propellant to obtain samples also increases the risk of an explosion. Repeated movement of these containers in order to conduct a stability monitoring program over a several year period increases the risk even more. Therefore, a stability monitoring program is not a viable option to mitigate the risk from the M6 propellant.

B. The M6 Propellant is a Solid Waste

The Army claims it never had title to, or control over, "solid waste" at any time in the propellant charge demilitarization process.[9] The Army cites 40 C.F.R. § 266.202(a) in support of its claim that M6 propellant is not a solid waste. The Army also argues that the M6 propellant stored at Camp Minden is not a solid waste because it is in storage and remains a marketable and useful product. Army Response at 8.

The Army's reliance on the definition of "solid waste" in 40 C.F.R. § 266.202(a) as to whether the M6 propellant is a solid waste is misplaced. RCRA regulations are not applicable in an action under Section 7003 of RCRA, although they may be used as guidance in making various determinations. In an action under Section 7003 of RCRA, the statutory definition of solid waste applies. *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d at 206. Under the statutory definition of solid waste, the M6 propellant is a solid waste if it is "discarded." 42 U.S.C.

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[8] The Army references the LSP's stability testing that occurred prior to moving the M6 propellant to the magazines that took place from November 20, 2012 through May 20, 2013. This testing is not useful for determining the current stability of the M6 propellant. These tests were done to ensure that it was safe to move the M6 propellant to the magazines. It is doubtful that the lots that were sampled by the LSP could be located today, given the storage conditions in the magazines.

[9]Ownership of the M6 propellant is not required for liability under Section 7003 of RCRA. For example, transporters very rarely own the waste they are transporting, but the statute provides that transporters can be held liable. The only requirement is that a person "contributes" to the handling, storage, treatment, transportation, or disposal of solid or hazardous waste. The Army's contribution is discussed in Section III.C.

§ 6903(27). As shown below, the M6 propellant became a solid waste (1) when it accumulated onsite and was not being recycled in any kind of reasonable time frame, and (2) as a result of its improper handling and storage. In addition, at the point that the M6 propellant had accumulated at Camp Minden in a manner constituting "discard," subsequent shipments of artillery charges to Explo would constitute "discard," and therefore these artillery charges would be solid waste. Therefore, the Army did have title to, and control over, solid waste for these subsequent shipments of artillery charges. Finally, the M6 propellant that remains onsite is also a solid waste because it was abandoned by Explo when it lost its explosive material licenses.

Materials originally intended for recycling can still be discarded and a solid waste. Courts have defined the term "discard" by reference to its ordinary meaning, and "discard" has been defined as meaning "to cast aside; reject; abandon; give up." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1041 (9th Cir. 2004). If the materials are destined for future recycling by another industry, they may be considered "discarded" if they can reasonably be considered part of the waste disposal problem. *Safe Food and Fertilizer v. EPA*, 350 F.3d 1263, 1268 (D.C. Cir. 2003). Likewise, just because a material can be recycled at some time in the future does not mean that it is not also discarded. *United States v. ILCO, Inc.*, 996 F.2d 1126, 1132 (11th Cir. 1993) ("previously discarded solid waste, although it may at some point be recycled, nonetheless remains solid waste."); *American Mining Congress v. EPA*, 824 F.2d 1177, 1187, fn 13 (D.C. Cir. 1987); *American Petroleum Institute v. EPA*, 906 F.2d 729, 741 (D.C. Cir. 1990). Because of the wide range of recycling activities, the circumstances under which recycling takes place are key to determining whether a material is discarded. *See* 73 Fed. Reg. 64668, 64675 (October 30, 2008). When dealing with recycling, one must look at the entire recycling process.[10] Therefore, the Army should have reviewed Explo's ability to manage the recycling process from the time that it sent the artillery charges to Explo through the sale of the M6 propellant to customers.

Abandonment of stockpiled recyclable materials can cause them to be solid waste. Explo represented in its Demilitarization Proposal that after demilitarization, it would recycle the M6 propellant by using it at its slurry operations in Kentucky (to make explosives for mining operations) or sell it directly to third parties. Third party recyclers who generate revenue primarily from the receipt of the material may accumulate more inputs than can be reclaimed.[11] *See* 73 Fed. Reg. at 64677 - 64678. If this were the case, Explo would have had an economic incentive to continue to receive the artillery charges even if it were unable to sell the M6 propellant. Explo would also have had less incentive to manage the material as a valuable commodity. *See* 73 Fed. Reg. at 64677. In fact, Explo was not able to timely recycle the M6 propellant, and the M6 propellant ended up accumulating onsite, resulting in the M6 propellant being discarded. Abandonment of stockpiled materials is one way discard can occur at recycling facilities, and is one of the major causes of environmental problems. 73 Fed. Reg. at 64712.

Because materials sent to a third party recycler could end up discarded and cause an environmental problem, the Army, like any private entity, has the responsibility to exercise due

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[10] Letter to N.G. Kaul, P.E. from Sylvia K. Lowrance, EPA dated October 11, 1991, RCRA Online Document 11645.

[11] When Explo was able to sell the M6 propellant, it received $0.08/pound.

care to confirm that Explo could properly manage the recycling of the artillery charges.[12] The Army owned the artillery charges and its components throughout the demilitarization process. Given the Army's extensive knowledge of munitions, it knew or should have known of the potential for the stockpiling or accumulation of munitions as the result of a large munitions demilitarization contract. Therefore, this responsibility would include not only reviewing Explo's technical capability to recycle the M6 propellant, but also determining whether there is capacity in the market to use the demilitarized M6 propellant in a reasonable time frame. *See* 73 Fed. Reg. at 64673, 64685 – 64690, and 64712. Determining Explo's capacity to recycle the M6 propellant in a timely manner was particularly important given that the Army recommends that demilitarized propellant be reused, destroyed, or transferred to a third party within one year after demilitarization.[13] The Army cannot close its eyes to what could happen during the implementation of a munitions demilitarization contract. *See Catellus Development Corporation v. United States*, 34 F.3d. 748, 752 (9th Cir. 1994).

There were a number of opportunities during the contracting process that would have allowed the Army to make these determinations, including evaluating Explo's Demilitarization Proposal and conducting a Pre-Award Safety Survey. There were also a number of provisions in the Contract[14] that reflected the Army's understanding of the importance of proper management of the M6 propellant, including: (1) Section 4.1 requiring the submission of a Demilitarization Plan; (2) Section 4.1.1 requiring Explo to prepare a Safety Site Plan for Army approval; (3) Section 7.1 requiring that the propellant be retained by type and lot number; (4) Section 12.3, which required adequate, safe, and secure storage of the M6 propellant until such time as it was sold or disposed of; and (5) Section 13.5 requiring that propellant only be offered for resale to licensed/permitted buyers, and requiring an end use certification as a condition of sale. There were also weekly visits by Defense Contract Management Agency (DCMA) and quarterly safety inspections by DCMA.[15]

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[12] EPA regulations and guidance documents have long recognized the need to evaluate and confirm hazardous materials recycling practices, particularly in cases where persons are claiming that their hazardous materials are not solid wastes. 73 Fed. Reg. 64668 (October 30, 2008); 73 Fed. Reg. 638 (January 4, 1985); "F006 Recyling", Sylvia K. Lowrance, April 26, 1989, OSWER Dir. 9441.1989(19). EPA evaluates recycling claims on a case by case basis. Among the factors that EPA will examine include, but are not limited to: (1) does the material provide a useful contribution to the recycling process or to the product of the recycling process; (2) is the product of the recycling process valuable; (3) is the material managed as a valuable commodity; and (4) does the product of the recycling process contain toxic constituents that an analogous product would not.

[13] Supply Bulletin (SB) 742-1, Section 13-8 Note (September 1, 2008).

[14] Contract No. W52P1J-10-C-0025 (Contract).

[15] Some of these items will be discussed in Section III.C.

If a facility recycles an insufficient amount of the material it receives a year, that material may be deemed discarded, and thus a solid waste. In *Owen Electrical Steel Company of South Carolina, Inc. v. Browner*, 37 F.3d 146, 150 (4th Cir. 1994), the Fourth Circuit found that slag that sat untouched for six months before it was sold constituted "discarded material" and therefore was a solid waste. In addition, some courts have referred to the regulatory definitions of solid waste in determining whether a material is a solid waste under the statutory definition. *Safe Air for Everyone*, 373 F.3d at 1046 n.14; *WaterKeeper Alliance v. U.S. DoD*, 152 F.Supp. 2d 163, 168 (D. P.R. 2001). EPA may also consider these regulatory definitions for the purpose of applying Section 7003 of RCRA. For example, under 40 C.F.R. § 261.2(c)(4), materials that accumulated speculatively may be discarded. In determining the length of time that must pass before the accumulated M6 propellant may be considered discarded, EPA may look to the definition of speculative accumulation for guidance. 40 C.F.R. § 261.1(c)(8). The regulation generally provides that material is being accumulated speculatively if the facility recycles less than 75% of the material it receives during a calendar year.

Capacity did not exist in the market to sell the M6 propellant in a reasonable time frame. For example, for the years 2011 and 2012, Explo recycled less than 75% of the M6 propellant demilitarized during each calendar year. Simple math from Explo's records demonstrates this fact. In 2011, Explo demilitarized approximately 9.1 million pounds of M6 propellant, and claims to have sold approximately 350,000 pounds of M6 propellant in the 3rd and 4th quarters of 2011.[16] Subtracting 350,000 pounds from 9.1 million pounds leaves approximately 8.75 million pounds of M6 propellant on-site. Therefore, Explo recycled only approximately 4% of the M6 propellant that it demilitarized in 2011. From January through November 2012, Explo demilitarized approximately 9.8 million pounds of M6 propellant, and claims to have sold approximately 1.35 million pounds of M6 propellant, resulting in approximately 8.45 million additional pounds of M6 propellant accumulating on-site. Thus, Explo recycled only approximately 14% of the M6 propellant that it demilitarized in 2012. Considering the regulatory definition of speculative accumulation, EPA views the M6 propellant that accumulated on-site as discarded. The M6 propellant accumulated for a sufficient length of time during which Explo recycled much less than the 75% specified in EPA's regulations. For 2011 and 2012, the amount of M6 propellant that accumulated on-site reached approximately 17.2 million pounds.[17]

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[16] We don't know with any certainty whether Explo sold any M6 propellant in the 1st and 2nd quarters of 2011. Given the discrepancies between what Explo claimed to have sold in its End Use Certifications and the amount of M6 propellant that accumulated onsite, any information from Explo regarding sales of the M6 propellant is questionable. The information concerning the amount of M6 propellant sold in the 3rd and 4th quarters of 2011 and in 2012 came from a September 17, 2013 filing in Explo's bankruptcy case.

[17] These calculations are based on Explo's Production Progress Reports from January 2011 – November 2012. 444,796 artillery charges were demilitarized in 2011, and 479,080 charges demilitarized in 2012. Each charge contains approximately 20.6 pounds of M6 propellant. The calculations assumed that 20.5 pounds of M6 propellant was recovered from each charge.

Explo was unable to sell the vast majority of the M6 propellant that it demilitarized, another indication that the material was, in fact, discarded. The amount can be determined by comparing the amount demilitarized against the amount of M6 propellant that Explo claimed to have sold. First, to determine the amount of M6 propellant that was demilitarized, EPA reviewed Explo's November 2012 Production Progress Report. According to the Report, Explo stated that approximately 1,146,995 artillery charges had been demilitarized from June 2010 through November 2012.[18] Each charge contained approximately 20.6 pounds of M6 propellant. Mathematically, if Explo recovered 20.5 pounds of M6 propellant from each charge, approximately 23.5 million pounds of M6 propellant would have been recovered. Second, to determine the amount sold, EPA looked at the records documenting a sale of M6 propellant. The sales record is called an End Use Certification, which the Army's contract required Explo to prepare in order to sell the M6 propellant to a customer. A review of the End Use Certifications for the M6 propellant from July 8, 2010 through October 15, 2012 shows that Explo claimed to have sold approximately 18.5 million pounds of the approximately 23.5 million pounds of M6 propellant that should have been recovered. Therefore, there should have been only approximately 5 million pounds of M6 propellant at the Explo Site at the end of November 2012. Instead, there were approximately 17.8 million pounds of M6 propellant that remained on-site. Explo was unable to sell approximately 76% of the M6 propellant that it recovered from June 2010 through November 2012.[19] Despite what Explo claimed in the End Use Certifications, Explo sold only 24% of the M6 propellant that it recovered (or demilitarized).

An additional factor to consider in determining whether the M6 propellant was discarded was whether the M6 propellant was actively being recycled or merely had the potential of being recycled. *Safe Air for Everyone v. Meyer*, 373 F.3d at 1043. At Camp Minden, the M6 propellant was not actively being recycled. Using the same facts noted above, in 2011, Explo demilitarized approximately 9.1 million pounds of M6 propellant, and claims to have sold approximately 350,000 pounds of M6 propellant in the 3rd and 4th quarters of 2011. In 2012, Explo demilitarized approximately 9.8 million pounds of M6 propellant and claims to have sold approximately 1.35 million pounds of M6 propellant. The amount sold was only 9% of the total M6 propellant demilitarized in 2011 - 2012.[20] Thus, the M6 propellant was not actively being recycled in 2011 and 2012, and is considered discarded.

Once the M6 propellant began accumulating onsite and was a solid waste, subsequent shipments of the artillery charges were no longer even arguably recyling; they were discarded as solid waste. Thus, at a certain point of time, most likely at some point in late 2011, but no later than early 2012, the artillery charges sent to Camp Minden were being discarded, and the Army would be considered a generator of solid waste for those subsequent shipments of artillery charges to Explo. The issue of discard was definitely settled when Explo's explosive material

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[18] Explo stopped demilitarizing the artillery charges in November 2012.

[19] 17,800,000/23,500,000 x 100 = 76%.

[20] Explo recovered approximately 18.9 million pounds of M6 propellant during 2011 – 2012 and only recycled approximately 1.7 million pounds of M6 propellant during the same time period. 1,700,000/18,900,000 x 100 = 9%.

license was revoked, and it was required to relinquish the keys to all magazines containing the explosives at Camp Minden. At this point, it is indisputable that Explo abandoned all of material in the magazines, including the M6 propellant. Abandonment of a material constitutes "discard." *Safe Air for Everyone v. Meyer*, 373 F.3d at 1041.

Explo itself did not treat the material as a valuable commodity, another indicator that the material was discarded. *See Safe Food and Fertilizer v. EPA*, 350 F.3d at 1269. The M6 propellant processed at Camp Minden is an artillery propellant comprised of 87% nitrocellulose, which is subject to degradation with aging, the end result being auto-ignition. Chemical ingredients known as stabilizers are added to the M6 propellant during manufacturing to prevent self-ignition during the useful life of the M6 propellant. The stabilizers added to the M6 propellant degrade or deteriorate over time, and exposure to heat and humidity accelerates the degradation or deterioration of said stabilizers. Of the 17,800,000 pounds stored onsite in November 2012, approximately 10 million pounds were improperly stored. The M6 propellant was stored in various containers, including 60 pound boxes, various size barrels, and 880 supersacks[21] throughout the buildings, hallways, and outdoors at the Explo Site, where it was exposed to heat and humidity, increasing the rate of degradation of the stabilizers in the M6 propellant. Due to Explo's failure to keep lots segregated, lot integrity was lost. Additionally, Explo had not implemented a propellant stability monitoring program for the M6 propellant stored at Camp Minden, and the M6 propellant cannot be safely transported or recycled unless the M6 propellant's stability is determined. All of these facts demonstrate that Explo was no longer treating the M6 propellant as a valuable commodity.

The Army's claims that the material could be recycled and sold are contradicted by the lack of a market to sell these volumes of M6 propellant. The Army claims that the M6 propellant still remains a marketable and useful product. Army Response at 8 – 9. The very limited market for M6 propellant is clear from the Louisiana Military Department's (LMD) experience attempting to sell the M6 propellant. Exhibit A to this Enclosure is a Memorandum from LMD which documents its attempt to sell the M6 propellant. LMD found no buyers for the M6 propellant. The Army's Response also references the M6 propellant in Camden, Arkansas. Army Response at 6 and 8. Because there was insufficient storage space at Camp Minden, Explo transferred 2.8 million pounds of M6 propellant from Camp Minden to an Austin Powder facility in Camden, Arkansas during the period from November 2012 until sometime in 2013. This was supposed to be only a temporary solution to Explo's need for additional storage space. Explo claimed that it would sell this M6 propellant to third parties at a rate of approximately 80,000 – 100,000 pounds per week. However, only 200,000 pounds were sold, leaving 2.6 million pounds of M6 propellant at Camden, Arkansas.[22] Exhibit B to this Enclosure is a Consent Order authorizing the sale of the 2.6 million pounds of M6 propellant at Camden, Arkansas to Brakefield Equipment, Inc. (Brakefield) for $208,000 (or $0.08/pound). However, Brakefield expects to consume only between 64,480 and 128,969 pounds of M6 propellant per month.

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[21] The various boxes, barrels, and supersacks Explo used to hold the M6 propellant are not proper packaging material for long term storage of M6 propellant.

[22] Contrary to the Army's assertions, EPA did not approve this sale. The sale took place prior to Explo's bankruptcy filing.

Given that the LMD has been unable to sell the M6 propellant, and the relatively small amounts that Brakefield is able to consume, there is a very limited market for the M6 propellant.

The M6 propellant may be recyclable, but that does not mean that it cannot be a solid waste. *United States v. ILCO, Inc.*, 996 F.2d at 1132 ("previously discarded solid waste, although it may at some point be recycled, nonetheless remains solid waste."); *American Mining Congress v. EPA*, 824 F.2d at 1187, fn 13; *American Petroleum Institute v. EPA*, 906 F.2d at 741. RCRA specifically contemplates the recycling of hazardous waste (40 C.F.R. § 261.6), and the EPA has a number of regulations allowing the recycling of hazardous waste under certain conditions. *See e.g.*, 40 C.F.R. Part 266, Subparts C, F, and G. However, there is only a small market for the M6 propellant at this time and excessive amounts have been accumulated, showing that the material has been discarded.

Explo's own conduct demonstrates that the M6 propellant was a solid waste. The material was not being actively recycled and it accumulated onsite over at least a two-year period. It was not handled as a valuable commodity; rather it was placed outside where it was exposed to heat and humidity, which increased the rate of degradation of the stabilizers in the M6 propellant. The M6 propellant was not properly packaged for long term storage. Due to Explo's failure to keep the different lots of propellant segregated, lot integrity was lost. For all of these reasons, it is clear that the M6 propellant which accumulated onsite became a solid waste. Thereafter, subsequent shipments of the artillery charges to Explo by the Army would constitute "discard," and therefore, solid waste. Thus, the Army was a generator of solid waste for those subsequent shipments of artillery charges to Camp Minden. Finally, the M6 propellant remaining onsite is solid waste because it was abandoned by Explo.

C. The Army Has Contributed or is Contributing to the Handling, Storage, and/or Disposal of a Solid Waste

The Army claims that it did not contribute to the handling, storage, or disposal of solid waste, claiming it did not have the requisite control over the M6 propellant to hold the Army liable under Section 7003 of RCRA. The Army asserts that it only had the authority to cease shipping additional artillery charges to Explo; it never had the authority to direct, control, or terminate the Explo operations involving the recovered propellant. The Army also claims that there was no affirmative action on the part of the Army or DoD that establishes that the Army was contributing to any acts of Explo that involved the handling, storage, or disposal of solid waste after title to the recovered components vested in Explo. Army Response at 9 – 11.

The Army contributed to the handling, storage, and/or disposal of solid waste and/or hazardous waste under the ordinary meaning of those terms and as they have been interpreted by relevant legal authorities. "RCRA does not define the term 'contribute' or any variation thereof. This silence compels us to start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used." *Cox v. City of Dallas, Texas*, 256 F.3d 281, 294 (5th Cir. 2001) (citation and internal quotation marks omitted). "Webster's Dictionary defines contribute as to have a share in any act or effect." *Id.* (citation and internal quotation marks omitted). The Court in *Cox* followed the 4th Circuit and interpreted 'contribute' to mean "have a part or share in producing an effect" *Id.* at 294 – 295; *United States v. Aceto Agricultural*

Chemicals Corporation, 872 F.2d at 1382 (legislative history of Section 7003 supports a broad, rather than narrow, construction of "contributed to"). Liability under Section 7003 of RCRA also extends to non-negligent off-site generators. *Northeastern Pharmaceutical & Chemical Company, Inc.*, 810 F.2d 726, 740 (8th Cir. 1986). Likewise, neither ownership of the contaminated property nor of the abandoned material is necessary for purposes of liability under Section 7003 of RCRA. Sen. Rep. No. 284, 98th Cong., 1st Sess. 58 (1983); H.R. Rep. No. 1133, 98th Cong., 2nd Sess. 119 (1984). "It is not necessary that a party have control . . . over the handling of materials at a site in order to be found to be a contributor within the purview of RCRA." *United States v. Valentine*, 885 F.Supp. 1506, 1512 (D. Wyo. 1995). Finally, failure to exercise due care in selecting a contractor or lack of oversight of a contractor can be evidence of "contributing to." *Cox v. City of Dallas, Texas*, 256 F.3d at 297. In *Cox v. City of Dallas, Texas*, the Fifth Circuit noted the similarity of the case to an example considered in the 1979 Senate Report and a 1979 House Committee Report, each of which discussed how a generator of solid waste can be subject to liability even when another entity conducted disposal at the request of the generator. *Cox v. City of Dallas, Texas*, 256 F.3d at 297 (*citing* S. Rep. No. 172, 96th Cong., 1st Sess. 5 (1979)).

The Army contributed to the handling, storage, and/or disposal of a solid waste in this case when it failed to exercise due care by not taking steps to ensure that Explo could properly manage the recycling of the artillery charges. *See Cox v. City of Dallas, Texas*, 256 F.3d at 297. The Army is incorrect in asserting that its only obligation was to ensure that Explo had the technical ability to perform the contract. Army Response at 3. Equally important to reviewing Explo's technical capability to recycle the M6 propellant is determining whether there is capacity in the market to use the M6 propellant in a reasonable time frame, i.e., the material could actually be recycled and sold. *See* 73 Fed. Reg. at 64673, 64685 – 64690, and 64712. When dealing with recycling, one must look at the entire recycling process.[23] Due care by the Army would require review of Explo's ability to manage the recycling process from the time that the Army sent the artillery charges to Explo through the sale of the M6 propellant to customers, including whether Explo had the proper facilities, permits, and procedures in place in order to safely and properly conduct the demilitarization, including handling and storing the M6 propellant after demilitarization. *See* 73 Fed. Reg. at 64687 – 64688 and 64691. Abandonment of stockpiled materials is one way discard can occur at recycling facilities, and is one of the major causes of environmental problems. 73 Fed. Reg. at 64712. Given the Army's extensive knowledge of munitions, it should anticipate and prepare for such events that could result during the implementation of a large munitions demilitarization contract, including whether the demilitarized munitions are being stockpiled, as opposed to being recycled. The Army cannot close its eyes to what could happen during the implementation of a munitions demilitarization contract. *See Catellus Development Corporation v. United States*, 34 F.3d at 752.

The Army contributed to the accumulation and improper handling and storage of the M6 propellant (which resulted in the M6 propellant becoming a solid waste) via the following:

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[23] Letter to N.G. Kaul, P.E. from Sylvia K. Lowrance, EPA dated October 11, 1991, RCRA Online Document 11645.

1. Inadequate Investigation/Review of Explo's Demilitarization Proposal (e.g., Demilitarization Capability);
2. Failure to Address Explo's Misrepresentations in its Demilitarization Plan Prior to Shipping the Artillery Charges to Explo in June 2010;
3. Lack of Oversight of Contract Implementation (e.g., the Recycling Process); and
4. Continued Shipments of the Artillery Charges to Explo after the M6 Propellant Accumulated Onsite and Became a Solid Waste.

1. The Army did an Inadequate Investigation/Review of Explo's Demilitarization Proposal (e.g., Demilitarization Capability)

The Army did not exercise due care in evaluating Explo's ability to recycle the M6 propellant. Explo stated in its Proposal that it would use the demilitarized M6 propellant at its slurry facility in Kentucky. However, the slurry facility was never constructed and the Army did not investigate whether it was constructed until after it awarded the contract to Explo, and only discovered that the slurry facility was not in fact constructed during a site visit two months after the contract was awarded. Because of Alcohol, Tobacco, and Firearms (ATF) rules, before a M6+ANFO (ammonium nitrate/fuel oil) slurry could be mixed and transported offsite (assuming that Explo was planning an M6+ANFO slurry)[24], it would have to be laboratory tested, approved, and have a classification assigned according to Department of Transportation (DOT) requirements prior to shipping such mixtures. 49 C.F.R. § 173.51. ATF approval was far from assured. Otherwise, it would have to be mixed onsite prior to being used as an explosive. Had the Army done the appropriate investigation before awarding the contact it would have known that Explo's assertion was not reliable. These issues are not outside the scope of the contract as the Army asserts, because they go to the heart of Explo's claims that it had the technical ability to perform the contract. If the slurry facility were not built, Explo would not have the technical ability to recycle the M6 propellant in its slurry facility, as stated in its Proposal.

Reasonable investigation would also have revealed that Explo misrepresented that it had adequate storage capacity for both the incoming artillery charges (which were owned by the Army) and the recovered M6 propellant. Explo stated in its Proposal that it had storage capacity at its Kentucky facility. However, Explo never had a permit to store explosives at its Kentucky facility. Explo also misrepresented its storage capacity in its Proposal, stating three separate times that it had 70 million pounds of net explosive weight (NEW) storage capacity. Section 12.3 of the Contract required "adequate, safe, and secure storage of the [M6 propellant] until such time as it was sold or disposed of . . ." (emphasis added). It is reasonably forseeable that fluctuations in the market for recycled explosives would require adequate storage space. That requirement is essential for protecting against the unlawful storage of material that is not recycled and sold, exactly the situation that arose in this case. Under RCRA, the Army does have a responsibility to exercise due care in selecting the contractor for recycling materials it can no longer use, and assuring that there is adequate storage space to deal with the forseeable stockpiling is part of that responsibility. *See* 73 Fed. Reg. at 64685 – 64690.

[24] The M6 propellant was typically recycled by mixing the M6 propellant with an ammonium nitrate/fuel oil mixture.

Due care in evaluating this contractor would also have revealed that Explo had a demonstrated inability to complete prior demilitarization contracts. Explo had leftover explosive wastes from other demilitarization contracts onsite. This not only affected the amount of potential storage space, but also called into question Explo's ability to perform future demilitarization contracts. Explo stated in its Proposal that it had demilitarized more than 25,000 M117A2 bombs as a subcontractor for GD-OTS and 12,200 M117A2 bombs as a subcontractor for ATK, so the Army was on notice of the potential for leftover explosive wastes. The leftover material that DoD and Army representatives found in May 2013 included the following:

a. 128 pounds of black powder;
b. 200 pounds of Composition H6;
c. Four 50-gallon drums of ammonium perchlorate;
d. Two 50-gallon drums and 150 pound boxes of Explosive D (ammonium picrate);
e. 109,000 pounds of M30 propellant;
f. 320,000 pounds of Clean Burning Incendiary (CBI);
g. 661,000 pounds of nitrocellulose;
h. 1.817 million pounds of tritonal; and
i. Several 16 ounce bottles and a large tank of Super Critical Water Oxidation Unit influent.

Adequate exercise of due care before selecting this contractor would have revealed that Explo did not have the technical capability to recycle the M6 propellant in a slurry operation. The Army also failed to ensure that Explo had the proper permits at its Kentucky operation, and failed to conduct the review that would have demonstrated that Explo made material misrepresentations in its Proposal. The Army also failed to ensure that Explo had adequate storage space, and failed to ensure that Explo properly completed prior demilitarization projects. These failures to exercise due care contributed to the accumulation of the M6 propellant onsite and improper handling and storage of the M6 propellant.

2. The Army Failed to Address Explo's Misrepresentations in its Demilitarization Plan Prior to Shipping the Artillery Charges to Explo in June 2010

Explo misrepresented its ability to destroy Category D M6 propellant. The Demilitarization Plan stated that Category D M6 propellant would be destroyed within 60 days via the Static Detonation Chamber (SDC)-1200.[25] However, the SDC-1200 was never

[25] Section 4.1 of the Contract required that an ammunition demilitarization and disposal plan (Demilitarization Plan) be prepared by Explo. The Demilitarization Plan was required to detail all intended actions and processes to be utilized by the Explo in completing the demilitarization tasks stated in the Statement of Work (Section C of the Contract). The Demilitarization Plan was sent to Army for approval.

constructed.[26] In exercising due care, the Army should have conducted an onsite inspection or some other verification to ensure that Explo had a SDC-1200 prior to shipping the M6 propellant to Explo. Although the Army's records may show that no Category D M6 propellant was shipped to Explo, the Contract required stability testing by Explo, and that any Category D propellant found as a result of testing would be disposed of within 60 days. Although other options were available to Explo [*e.g.*, sending it to a permitted treatment, storage, or disposal (TSD) facility], this misrepresentation should have been addressed prior to shipping the artillery charges to Explo. In addition, the *DOD Contractor's Safety Manual for Ammunition and Explosives*, DoD 4145.26M, provided safety requirements for the collection and destruction of explosives. Since Explo stated that it would destroy the Class D M6 propellant via the SDC-1200, the Army should have reviewed Explo's safety procedures for the SDC-1200 to see if they met the requirements of DoD 4145.26M.

Explo misrepresented the conditions of the storage magazines. Section 12.1 of the Contract provided that "the contractor shall, upon receipt of individual lots of ammunition, ensure that adequate storage facilities are available to secure all Government property . . . Storage facilities must meet the requirements of DoD 5100.76 for categorized sensitive ammunition." The Demilitarization Plan provided that the artillery charges would be stored in magazines until the charges were ready for demilitarization. Prior to demilitarization, the Army owned the artillery charges. Explo submitted a photo of a "typical storage magazine" at Camp Minden in its Demilitarization Plan. The magazine photo does not show any trees growing on the roof and sides of the magazine, contrary to the pictures taken in January 2014 which showed large pine trees and/or heavy vegetation growing on the tops and sides of certain magazines (in apparent violation of 27 C.F.R. § 555.215).[27] The pine trees roots could breach the concrete walls of the magazines, compromising the structural integrity of the magazines, thus preventing the magazines from performing as designed (direct any blast through the roof and doorway). The Army contends that the condition of structures on the leasehold was the responsibility of the LMD and the Army had no authority or responsibility for conditions of the structures. Army Response at 6. However, Explo stated in its Demilitarization Plan that it would store the Army's artillery charges in the magazines. In failing to adequately investigate the storage conditions, the Army failed to exercise due care in sending the artillery charges to Explo for recycling. The Army could have awarded the contract to someone else, or not awarded the contract to Explo until the conditions of the magazines were addressed.

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[26] Explo did obtain a RCRA Permit for the SDC-1200, Permit No. LAR000032607-RDD-1. However, it was a Research and Development Permit, and was only valid for one year from the date of initial operation of the SDC-1200, unless it was revoked and reissued, modified or terminated.

[27] 27 C.F.R. § 555.215 provides in part that "[t]he area surrounding magazines is to be kept clear of rubbish, brush, dry grass, or trees (except live trees more than 10 feet tall), for not less than 25 feet in all directions. Volatile materials are to be kept a distance of not less than 50 feet from outdoor magazines. Living foliage which is used to stabilize the earthen covering of a magazine need not be removed."

3. The Army did not Conduct Adequate Oversight of Contract Implementation (e.g., the Recycling Process)

The Army failed to conduct adequate oversight. There were numerous provisions in the Contract addressing Army's oversight of Explo's activities. These provisions were necessary to ensure that the demilitarization process and the subsequent handling, storage, and recycling of the munitions were properly conducted according the appropriate regulations, directives, and guidance. The Army had an obligation to ensure that its contractor followed the appropriate procedures.[28] DMCA representatives visited the Explo site weekly. Therefore, DCMA was in a position to determine whether Explo was properly managing the recycling process. If the Army became aware of a significant problem, it could have withheld future shipments until the problem was fixed. In addition, the Army has an obligation under RCRA to ensure that Explo was properly managing the recycling process. *See Cox v. City of Dallas, Texas*, 256 F.3d at 297; *See* 73 Fed. Reg. at 64673, 64685 – 64690, and 64712. Also, Section 4.1.1 of the Contract required the Safety Site Plan to include the operational, storage, and receiving structures and sites as stated in DoD 4145.26M – *DOD Contractor's Safety Manual for Ammunition and Explosives*. The Army approved the Safety Site Plan despite Explo's deficiencies.

The DCMA, acting on behalf of the Army, did not exercise due care in administering the Contract. DCMA's responsibilities included weekly visits and quarterly safety inspections. A DCMA Quality Assurance Representative would visit the Explo site weekly to sign the Certificates of Destruction (CODs). The DCMA Quality Assurance Representative relied on Explo's representations regarding the completion of the demilitarization and final disposition of those materials and signed the CODs without independently verifying the statements made to them by Explo representatives that the demilitarization process had been properly completed. The DCMA Quality Assurance Representative did not go into the contractor operations areas

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[28] A multi-agency investigation team found that "the DCMA Quality Assurance Representative (QAR) did not perform all incremental process reviews as identified and scheduled as outlined on Facility level Risk Profile and Plan dated 06 August 2012 and as prescribed by DCMA Policy Instruction # 311." *In the Matter of United States Department of the Army, Webster Parish*, Louisiana Department of Environmental Quality, Enforcement Tracking No. MM-AO-14-00302 at 10 (June 3, 2014) (citing *Explo Systems, Inc. Ammunition & Explosive Commercial Demilitarization Preliminary Report*).

and/or magazines.[29] The DCMA Quality Assurance Representative told an EPA official that it was always escorted by an Explo representative and therefore they had no idea what was ". . . on the other side of the wall." The DCMA Safety Inspector did not go into the operational or storage areas at the Explo Site during the quarterly safety reviews. If DCMA personnel had gone inside the operational or storage areas, they would have not only found the M6 propellant improperly stored, but also numerous safety violations. If fact, a DMCA official was upset about the lack of an audit trail by the DMCA Safety Audit. In addition, according to Explo's Demilitarization Proposal and Demilitarization Plan, incoming artillery charges were to be stored in magazines. Therefore, the Army should have been able to inspect inside the magazines where the artillery charges were stored, particularly because the Army still owned the artillery charges at the point in the process.

Numerous improper storage and safety violations were documented in April 2013 that should have been noticed and corrected long before that date. For instance, in April 2013, the Army and DoD technical assistance team (Team) observed and documented such improper storage and safety violations. For example, artillery charges from the magazines were first sent to Building 1607, and later transferred to Building 1608 for demilitarization. Explo also repackaged and shipped M6 propellant in Building 1607. However, the Team found one million pounds of M6 propellant illegally stored in Building 1607 in April 2013, which as noted in Section III.B, the accumulation of the M6 propellant occurred over a several month period. The Team also found numerous safety violations in Building 1607. The Team observed that lightning protection for Building 1607 appeared to be deficient or in disrepair. If an explosion occurred in this Building, it would likely have involved the illegally stored M6 propellant.

The improper storage and safety violations occurred despite numerous Safety Audits being conducted by DCMA, demonstrating that those audits were inadequate. According to Explo's Production Progress Reports, DCMA Safety Audits were conducted on August 4, 2010, November 2, 2010 (with advance notice), March 22, 2011 (with advance notice), August 9, 2011, December 6, 2011, and August 28, 2012 (by the DCMA Safety Manager). In addition, a Joint Munitions Command (JMC) Demil Team visited the facility on April 5, 2011, and a JMC Audit was completed on July 13, 2011. The February 2011 Production Progress Reports noted that "Propellant EUCs[30] were reviewed by DMCA QAR[31] 24 February 24 2011. EUCs retained at Explo and are available upon request." The June 2011 Production Progress Report stated that "All EUCs submitted to JMC for CLIN AA."[32] According to the August 2011 Production Progress Report, the August 9, 2011 Safety Audit found no deficiencies. The December 2011 Production Progress Report stated that "no violations noted and no sitations [*sic*] issued" for the

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[29] 48 C.F.R. § 252.223-7002(b)(2) provides that "[t]he Contractor shall allow the Government access to the Contractor's facilities, personnel, and safety program documentation. The Contractor shall allow authorized Government representatives to evaluate safety programs, implementation, and facilities." This regulation was incorporated into the Contract.

[30] End Use Certifications.

[31] Quality Assurance Representative.

[32] Contract Line Item AA.

December 6, 2011 Safety Audit. A DCMA Contract Safety Inspection was conducted on March 13, 2012. No citations were issued. The June 2012 Production Progress Report noted that "EUCs for Option have been submitted." According to the August 2012 Production Progress Report, a DCMA Safety Audit was conducted on August 28, 2012 by the DMCA Safety Manager. "No CARs were issued, no violations noted" for the August 28, 2012 DCMA Safety Audit. However, some of the safety violations found by the DoD and Army Technical Assistance Team in April 2013 included observations such as "equipment used at propellant repack operations have electric motors, but explosive proof electrical outlets are not installed" and "deluge systems are not in place at the propellant download operation." These violations appear to be the type that would have existed prior to Explo beginning the demilitarization of the artillery charges in June 2010. Nonetheless, the DCMA inspectors did not flag these violations.

The Army failed to properly audit Explo's records, which would have revealed that Explo had not sold the amount it claimed and was therefore accumulating more material than was allowed. In order to sell the M6 propellant to customers, Explo had to prepare End Use Certifications. A review of the End Use Certifications for the M6 propellant from July 8, 2010 through October 15, 2012 shows that Explo claimed to have sold 18,502,810 pounds of the approximately 23,513,397 pounds of M6 propellant that should have been recovered. Therefore, there should have been approximately 5,014,587 pounds of M6 propellant at the Explo Site at the end of November 2012. The Production Progress Reports from October 2010 through November 2012 shows that the M6 propellant was sold to two or more entities. However, the Production Progress Reports never listed the quantity of M6 propellant that was allegedly sold. The Army should have audited Explo to confirm it had sold the amount of M6 that it claimed, and that it actually sold it to licensed/permitted entities.[33] The Army had a responsibility to ensure that the M6 propellant was being properly recycled, not being discarded, and not creating an environmental problem. *See* 73 Fed. Reg. at 64688 and 64712.

The Army failed to assure that Explo complied with the requirement in Section 12.3 of the Contract that Explo provide adequate, safe, and secure storage of the M6 propellant until such time as it was sold or disposed. The Army apparently relied on Explo's statements in its Proposal that it had adequate storage space [Explo misrepresented its storage capacity, stating three separate times that it had 70 million pounds of net explosive weight (NEW) storage capacity]. As it turned out, storage capacity was critical because Explo was unable to sell most of the M6 propellant it demilitarized despite what it claimed in the End Use Certifications. Approximately 10 million pounds of M6 propellant were unsecured and improperly and illegally stored. Much of the M6 propellant was stored outside, where it was exposed to heat and moisture, increasing the degradation rate of the stabilizers. The M6 propellant was also improperly packaged for long term storage. Explo also had leftover explosive wastes from other earlier demilitarization contracts onsite, which limited the amount of explosives Explo could safely store. Furthermore, Explo stored approximately 42,240 pounds of M6 propellant in a box van trailer because it had insufficient storage space in its magazines. On October 15, 2012, the

[33] The December 2011 Production Progress Report claims that propellant was sold to Boren Explosives, Kentucky Power, and Brakefield Equipment. However, a review of the End Use Certifications shows that only Brakefield Equipment purchased M6 propellant during December 2011.

M6 propellant stored in the trailer exploded, causing a nearby magazine to explode. The Army had responsibility under the Contract to make sure that Explo had adequate storage space, and its failure to do so contributed to the problems that led to the current unsafe conditions.

Despite the Army's claims, the Army had significant control over the recycling process under the terms of the Contract. Section 7.1 of the Contract required that propellant from the disassembly operations be retained by type and lot number. However, Explo failed to maintain lot integrity. The Army also required that all metallic components, explosives, and propellants offered for resale be sold to licensed/permitted buyers, and required an End Use Certification as a condition of sale. The Army's oversight also extended to metallic scrap and packaging material by requiring an inert certification as a condition of sale, and disposal of the material within 12 months. Explo was also required to inform the Government of the purchaser.[34] DCMA received copies of the End Use Certifications. DCMA representatives visited Explo weekly. The Army should have done an audit to confirm whether the material was being sold as intended by the Contract. The Army had a duty, since the M6 propellant is an inherently dangerous material, to ensure that the M6 propellant was actually being recycled and being sold to licensed dealers in explosives.

4. The Army Continued Shipments of the Artillery Charges to Explo after the M6 Propellant Accumulated Onsite and Became a Solid Waste

As noted in Section III.B of this Response, the Army continued to send artillery charges to Explo after the M6 propellant onsite became a solid waste. As such, the continued shipments of the artillery charges after the M6 propellant accumulated onsite constitutes "discard." The M6 propellant was not being recycled; it was being discarded. The Army held title to the artillery charges prior to demilitarization, and would be considered a generator of solid waste for those artillery charges it continued to send after it was clear that recycling was no longer occurring.

5. Summary

The Army had a responsibility to award the demilitarization contract to a qualified contractor. It had a higher oversight duty than what it had for a typical contract because the Explo Contract involved dangerous explosives. The Army also had a responsibility under RCRA to exercise due care in evaluating the proposals and the potential contractors to ensure that the material would be legitimately recycled and responsibly managed. If there were questionable circumstances, the Army should have investigated. The Army should have exercised due care to ensure that all the relevant safety requirements were being met and that the demilitarization process was being safely conducted, the M6 propellant was being handled and stored properly, and that the M6 propellant was sold to licensed recipients. The Army continued to ship the artillery charges to Explo after the M6 propellant began accumulating at the site and after the October 2012 explosion. Were it not for the Army shipping the artillery charges to Explo for demilitarization, the M6 propellant would not have accumulated and been improperly handled and stored. The Army failed in its responsibility, thus contributing to the accumulation and the improper handling and storage of the M6 propellant (which increased the rate of degradation of

[34] Section 13.9 of the Contract.

the stabilizers in the M6 propellant and compromised propellant lot integrity), ultimately resulting in the M6 propellant becoming a solid waste.

D. RCRA Requires the Army to Properly Manage the M6 Propellant.

Section 1003(a)(6) of RCRA, 42 U.S.C. § 6902(a)(6) states that one of the objectives of RCRA is to promote the protection of health and the environment and to conserve valuable material and energy resources by encouraging properly conducted recycling and reuse (emphasis added). As previously noted, abandonment of stockpile materials at a recycling facility is one of the major causes of environmental problems. 73 Fed. Reg. at 64712. Requiring the Army to remediate the M6 propellant abandoned at Camp Minden encourages responsible recycling by ensuring that recyclable materials do not accumulate, threaten public health and cause environmental problems.

IV. Conclusion

For the reasons set forth above, EPA finds that all of the necessary elements for issuing a RCRA Section 7003 UAO have been met.

STATE OF LOUISIANA
MILITARY DEPARTMENT

Camp Minden
100 Louisiana Boulevard
Minden, Louisiana 71055-7908

LANG-CM

23 April 2014

MEMORANDUM FOR RECORD

Subject: Explosive Material Sale

1. The purpose of this memorandum is to document Camp Minden's efforts to sale formerly owned EXPLO explosive materials.

2. During the month of October 2013 the undersigned developed and staffed a plan to sale explosive materials to a group of potential buyers. The list of potential buyers is at enclosure #1. This list includes former EXPLO customers, existing Camp Minden explosive commercial tenants and others who came to my attention during the previous six months. The plan was staffed thru LSP, EPA, ATF and LDEQ.

3. The approved plan included the following documents:

   a. Notice of sale that include list of conditions for sale, types and quantities of material available (Encl #2)
   b. Minimum Scope and Limits of Insurance (Encl #3)
   c. Indemnification and Hold Harmless Agreement (Encl #4)

4. Each potential buyer was contacted to see if they were interested and then an email with each of the above documents attached was forwarded. The Notice of sale provided a deadline of 14 NOV 2013 for each interested buyer to provide an offer. The results of this effort are documented at enclosure #1.

5. Any questions regarding this action should be referred to the undersigned at 318-382-4183.

Ronnie D. Stuckey

RONNIE D. STUCKEY
COL (Ret), LMD
Installation Commander

Explosive Material Sale Contacts

				Remarks
BST/ORICA	Rick Tucker	Rick Tucker Richard.tucker@orica.com		No reply
ORICA	Norman Wells	norman.wells@orica.com	318-918-3956/371-3956	Verbal reply - Not interested
EXPAL	Steve Dart	Steve Dart steve.dart@expalusa.com		No reply
EXPAL	David Turner	David Turner david.turner@expalusa.com		No reply
Jupiter Fuels	Joel Martin			No reply
Paul McDaniel Enterprises, Inc	Paul McDaniel	pmcdaniel@crosstel.net	918-452-3392 or 918-689-6093	No reply
EuroSource	Doug Moore	eurosource@mac.com	773-860-5142	No reply
UXB	Rich Dugger	rich.dugger@uxb.com	540-443-3706	No reply
ESI	Bill Poe	bpoe@explosiveserviceintl.com	225-275-2152	No reply
ATK	Chuck Williams		540-639-7225 or 540-230-7805	No reply
Dyno Nobel	Mark Stoffer	mark.stoffer@am.dynobel.com	860-593-0645	No reply
Brakefield Mining	Brenda	hardrockmining@hughes.net	918-789-3142	No reply
Boren Explosives Company	James Mann		205-686-5095	Verbal reply - Not interested
Phoenix Mining Company	Robert Hartley	clay.hartley@phoenixcoal.com	918-256-7873	No reply
Wesco Company	Don Collier	don.collier@wescoexplosives.com	801-484-6557, Ext 2/928-301-115	No reply
Indiana Ordnance Works	Dibbs Harting	dharting@iowinc.com	812-256-4478	No reply
Day and Zimmerman	Mark Rice	mark.rice@dayzim.com	903-490-1637	No reply
EQM	John Foster	jfoster@eqm.com	985-863-9840	No reply

Surplus Explosive Material for Sale
30 OCT 2013

Camp Minden has the following explosive materials available for sale to any organization that is properly licensed and interested in purchasing these materials. Any quantity up to and including the total amount listed is available. Conditions of the sale are as follows:

1. Must be properly licensed thru both the Louisiana State Police and Alcohol, Tobacco and Fire Arms to handle and possess explosive materials.
2. Material ownership transfers to purchaser when loaded onto truck. Purchaser is responsible for all aspects of shipping when ownership transfer is complete. Shipping includes providing personnel and equipment to remove material from storage igloos/magazines and loading onto trucks. Purchaser is also responsible for meeting all DOT requirements for shipment.
3. Purchaser agrees to accept material in an "as is where is" condition and will take all safety precaution necessary when removing material from storage. This includes using non-spark producing equipment and verifying stability as may be required from time to time.
4. All material must be removed within 60 days after purchase.
5. Purchaser must provide proof of liability insurance and sign a hold harmless agreement for the Louisiana Military Department (see attached).
6. Purchaser will provide certification of its intended use of the explosive material
7. All prospective purchasers acknowledge that the Military Department may use criteria other than lowest cost to determine the purchaser to whom to sell the material. Other important criteria include, but are not limited to amounts proposed to be purchased and length of time from agreement to transportation of the explosives off of Camp Minden.
8. Bids (electronic or fax) will be accepted thru 1600hours, 14 NOV 2013. Bids can be submitted electronically to Ronnie.stuckey@us.army.mil or by fax to 318-641-4156 (ATTN: COL Stuckey).

a. 15M lbs M6 Propellant (from M119 Prop Charge Demil program). Stored in three different packaging configurations; 50 lb cardboard boxes, 150 lb fiber drums, and 880 lb super sacks. All three configurations are stacked on pallets.
b. 2.2M lbs Tritonal (estimated 80% aluminum/20% TNT mixture) From 750 and 2000 lb bomb demil program. Material is stored in two different packaging configurations; 50 lb card board boxes and 150 lb fiber drums. Both configurations are stacked on pallets.
c. 660,000 lbs Nitrocellulose- stored in metal drums (estimated 40 gal or less). Requires wetting agent (alcohol or water for stability). Wetting agent stability has not been verified for six plus years.
d. 321,000 lbs Clean burning Igniter (from M119 Prop Charge Demil program)
e. 109,000 lbs M30 Propellant
f. 128 lbs black powder
g. 140 lbs ammonium picrate

- All of the above materials are available for viewing from 1-14 NOV. Interested parties must call (318-381-4159) in advance before making site visit.
- Any questions regarding this sale should be address to
  COL (Ret) Ronnie Stuckey
  (318) 382-4183 (W)
  (318) 542-5624 (C)
  Ronnie.stuckey@us.army.mil
- All of the above quantities are approximate

INDEMNIFICATION AND HOLD HARMLESS AGREEMENT FOR PURCHASE OF HAZARDOUS EXPLOSIVE MATERIAL LOCATED ON THE SITE OF CAMP MINDEN, MINDEN, LOUISIANA

The Louisiana Department of the Military (LADM) is making available certain hazardous explosive materials currently located on the site of Camp Minden, Minden, Louisiana.

The LADM is offering these explosives to qualified individuals, and/or businesses who/which are licensed by the Louisiana State Police (LSP) Alcohol Tobacco and Firearms Division. The undersigned, hereinafter referred to as "Transferee", expressly represents that he/she is authorized by licensure by the LSP to lawfully purchase and/or obtain the hazardous explosive materials that are being offered by the LADM.

As the Transferee, the undersigned hereby waives liability as to the State of Louisiana, all State Departments, Agencies, Boards and Commissions, its officers, employees, agents, representatives and volunteers, including but not limited to the Louisiana Department of the Military and the Louisiana State Police, relating to or resulting from the purchase, transfer, transport, use or sale of the hazardous explosive materials.

As the Transferee, the undersigned hereby understands and expressly acknowledges that these hazardous explosive materials are sold and/or transferred without any rights of redhibition, or warranty of any kind, express or implied, including any warranty of fitness, and the hazardous explosive materials are being sold and/or transferred in "as is" condition. Transferee accepts immediate possession and custody of the sold and/or transferred hazardous explosive materials.

As the Transferee, the undersigned acknowledges its agreement to protect, defend, indemnify, save and hold harmless the State of Louisiana, all State Departments, Agencies, Boards and Commissions, its officers, employees, agents, representatives and volunteers, including but not limited to the Louisiana Department of the Military and the Louisiana State Police from and against any and all claims, damages, expenses, and liability arising out of injury or death to any person or the damage, loss or destruction of any property which may occur, or in any way grow out of the purchase, transfer, transport, use or sale of hazardous explosive materials.

As the Transferee, the undersigned acknowledges his/her understanding and compliance with all applicable Federal, State and Local regulations governing the purchase, transfer, transport, use or sale of the hazardous explosive materials.

_____

Printed Name of Transferee, Title of Transferee, Business Name of Transferee

_____

Signature of Transferee

_____

Date of Signature

A. MINIMUM SCOPE AND LIMITS OF INSURANCE

1. **Workers Compensation**
   Workers Compensation insurance shall be in compliance with the Workers Compensation law of the State of Louisiana. Employers Liability is included with a minimum limit of $1,000,000 per accident/per disease/per employee. A.M. Best's insurance company rating requirement may be waived for workers compensation coverage only.

   The insurer shall agree to waive all rights of subrogation against the State of Louisiana, its departments, agencies, boards and commissions, including agents, officers, employees and volunteers for losses arising from work performed by the Transferee or Purchaser for the Louisiana Military Department (LMD).

2. **Commercial General Liability**
   Commercial General Liability insurance, including coverage for explosion risk, shall have a minimum limit per occurrence of $1,000,000, inclusive of umbrella and/or excess liability coverage. An Occurrence Policy Form is required for this coverage.

   The State of Louisiana, its departments, agencies, boards and commissions, including agents, officers, employees and volunteers shall be named as Additional Insureds on the Transferee or Purchaser's Commercial General Liability Policy as regards the negligence of the Transferee or Purchaser.

3. **Automobile Liability**
   Automobile Liability Insurance shall have a minimum limit per occurrence of $1,000,000. This insurance shall include third-party bodily injury and property damage liability for owned automobiles. An Occurrence Policy Form is required for this coverage.

   Auto Liability Hazardous Cargo Endorsement Provision:
   If the Transferee or Purchaser utilizes a vehicle that is licensed or should be licensed for use on roads, and the vehicle will be used in the transporting, loading or unloading of hazardous materials, the Automobile Liability Insurance shall be endorsed to include coverage for hazardous cargo exposure.

4. **Project Specific Pollution Liability**
   Project Specific Pollution Liability insurance, including gradual release as well as sudden and accidental, shall have a minimum limit per occurrence of not less than $1,000,000, inclusive of umbrella and/or excess liability coverage. An Occurrence Policy Form is preferred.

   A Claims-Made Policy Form is acceptable subject to the Transferee or Purchaser's purchase of a ten (10) year Extended Reporting Endorsement (tail coverage). A policy period inception date of no later than the first day of anticipated work under this contract and an expiration date of no earlier than 30 days after anticipated completion of all work under the contract shall be provided.

   The State of Louisiana, its departments, agencies, boards and commissions, including agents, officers, employees and volunteers shall be named as Additional Insureds on the Transferee or Purchaser's Pollution Liability Policy as regards the negligence of the Transferee or Purchaser.

B. DEDUCTIBLES AND SELF-INSURED RETENTIONS

Any deductibles or self-insured retentions must be declared to and accepted by the LMD. The Transferee or Purchaser shall be responsible for all deductibles and self-insured retentions.

C. ALL COVERAGE PROVISIONS

1. Coverage shall not be canceled, suspended, or voided by either party (the Transferee or Purchaser or the insurer) or reduced in coverage or in limits except after 30 days written notice has been given to the LADM. Ten-day written notice of cancellation is acceptable for non-payment of premium. Notifications shall comply with the standard cancellation provisions in the Transferee or Purchaser's policy.

2. Neither the acceptance of the completed work nor the payment thereof shall release the Transferee or Purchaser from the obligations of the insurance requirements or indemnification agreement.

3. The insurance companies issuing the policies shall have no recourse against the State of Louisiana or its agencies for payment of premiums or for assessments under any form of the policies.

4. Any failure of the Transferee or Purchaser to comply with reporting provisions of the policy shall not affect coverage provided to the State of Louisiana, its departments, agencies, boards and commissions, including agents, officers, employees and volunteers.

D. ACCEPTABILITY OF INSURERS

All required insurance shall be provided by a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located. Insurance shall be placed with insurers with an A.M. Best's rating of **A-:VI or higher**. This rating requirement may be waived for workers compensation coverage only.

If at any time an insurer issuing any such policy does not meet the minimum A.M. Best rating, the Transferee or Purchaser shall obtain a policy with an insurer that meets the A.M. Best rating and shall submit another Certificate of Insurance as required in the contract.

E. VERIFICATION OF COVERAGE

Transferee or Purchaser shall furnish the LMD with Certificates of Insurance reflecting proof of required coverage. The Certificates for each insurance policy are to be signed by a person authorized by that insurer to bind coverage on its behalf. The Certificates are to be received and approved by the LADM before work commences and upon any contract renewal thereafter. The LADM reserves the right to request complete certified copies of all required insurance policies at any time.

Upon failure of the Transferee or Purchaser to furnish, deliver and maintain such insurance as above provided, this transfer or purchase, at the election of the LMD, may be suspended, discontinued or terminated. Failure of the Transferee or Purchaser to purchase and/or maintain any required insurance shall not relieve the Transferee or Purchaser from any liability or indemnification under this transaction.

SO ORDERED, SIGNED April 14, 2014.

STEPHEN V. CALLAWAY
UNITED STATES BANKRUPTCY JUDGE

FILED
APR 16 2014
EDWARD A. TAKARA, CLERK
UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT of LOUISIANA

IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

In re	Chapter 11
EXPLO SYSTEMS, INC.,	Case No. 13-12046
Debtor.	Judge Stephen V. Callaway

STIPULATION AND CONSENT ORDER GRANTING, IN PART, DEBTOR'S MOTION FOR ORDER AUTHORIZING SALE OF M 6 PROPELLANT FREE AND CLEAR OF LIENS, CLAIMS, RIGHTS, INTERESTS AND ENCUMBRANCES

Explo Systems, Inc., debtor herein (the "**Debtor**"), John W. Luster ("Trustee"), the Chapter 11 Trustee herein, Austin Powder Company ("APC"), the United States Environmental Protection Agency, the United States Bureau of Alcohol, Transportation, and Firearms, the United States Department of the Army, and the United States Department of Transportation enter into this *Stipulation and Consent Order Granting, In Part, Debtor's Motion for Order Authorizing Sale of M6 Propellant Free and Clear of*

GOVERNMENT EXHIBIT B

Liens, Claims, Rights, Interests and Encumbrances (the "Stipulated Order") to resolve certain issues related to the disposition of the Debtor's M6 Propellant that is currently stored at APC's facility in East Camden, Arkansas (the "Camden Facility"). The Debtor and APC (together, the "**Parties**") hereby stipulate as follows:

WHEREAS, the Debtor commenced the above-captioned case (the "**Bankruptcy Case**") with the filing of a voluntary petition for relief under Chapter 11 of Title 11 of the United States Code (the "**Bankruptcy Code**") on August 8, 2013 (the "**Petition Date**");

WHEREAS, the Debtor was a demilitarization and energetic material recycling company operating out of Camp Minden, a former Louisiana Army Ammunition Plant located in Webster Parish, Louisiana (the "**Minden Facility**");

WHEREAS, prior to the Petition Date, the Debtor, acting as a contractor for the United States Government, demilitarized certain former military ordinance containing energetic material commonly referred to as M6 Propellant;

WHEREAS, on or about October 12, 2012, some of the Debtor's material at the Minden Facility exploded (the "**Explosion**"). As a result of the Explosion, a storage facility at the Minden Facility was damaged. A subsequent investigation by the Louisiana State Police determined that the Debtor was storing significant amounts of M6 Propellant. Consequently, the Debtor began looking for additional suitable and properly licensed warehouse space to temporarily store a portion of its remaining energetic material;

WHEREAS, the Debtor subsequently contacted APC, a licensed manufacturer and distributor of explosives, regarding the possibility of temporarily storing a portion of the Debtor's M6 Propellant at the Camden facility. In an effort to assist the Debtor and to

aid in the public safety of the State of Louisiana and its citizens and residents, APC agreed to provide the Debtor with temporary storage space for approximately 1 million pounds of the Debtor's M6 Propellant at its Camden Facility. Over time, in furtherance of such assistance to the Debtor and the State of Louisiana and its citizens and residents, additional quantities of the Debtor's M6 Propellant were delivered to APC's Camden Facility. Currently, approximately 2.8 million pounds of the Debtor's M6 Propellant is being stored at APC's Camden Facility;

WHEREAS, APC does not have any ownership interest in the Debtor's M6 Propellant currently stored at APC's Camden Facility;

WHEREAS, the Debtor's federal licenses as both a manufacturer and importer of explosives (collectively, the "**Licenses**") were revoked effective August 5, 2013;

WHEREAS, on August 30, 2013, the Debtor filed a motion (the "**Sale Motion**"), pursuant to section 363 of the Bankruptcy Code, seeking authority to sell the Debtor's M6 Propellant currently located at APC's Camden Facility to Brakefield Equipment, Inc. ("**Brakefield**") for $208,000, such sale to be free of all liens, claims, rights, interests and encumbrances (collectively, the "**Liens**");

WHEREAS, the United States of America on behalf of the United States Environmental Protection Agency (the "**EPA**") objected (the "**Objection**") to the Sale Motion, asserting that the proposed sale could not be approved due to (i) the revocation of the Debtor's Licenses, and (ii) concerns regarding the stability of the Debtor's M6 Propellant currently located at APC's Camden Facility;

WHEREAS, the EPA and APC have agreed to the terms of a stability testing, transportation and re-use/disposal plan ("Plan") that includes a testing procedure to be

followed to determine the stability level of each lot ("**Lot**") of the Debtor's M6 Propellant currently located at APC's Camden Facility, a copy of the referenced Plan is annexed hereto as Exhibit "A";

WHEREAS, the M6 Propellant currently located at APC's Camden Facility remains the property of the Debtor's estate that is of no value to the Debtor and its estate, and represents an ongoing liability to both the Debtor and its estate in that, among other things, (i) the estimated cost to effectively and safely dispose of its M6 Propellant currently located at APC's Camden Facility in accordance with all applicable laws and ordinances is $11.3 million, and (ii) storage fees due and owing to APC continue to accrue in the amount of $9,350 per month;

WHEREAS, the Debtor lacks both the necessary licenses to handle, sell, or otherwise possess M6 propellant and sufficient funds to effectively and safely dispose of its M6 Propellant currently located at APC's Camden Facility in accordance with all applicable laws and ordinances;

WHEREAS, the Parties did not intend that APC's voluntary and beneficial act in storing the Debtor's M6 Propellant at its Camden Facility would result in APC being made permanently and fully liable for the complete custody, monitoring and ultimate lawful disposition of the Debtor's M6 Propellant;

WHEREAS, it is inequitable and unfair to compel APC to continue to store the Debtor's M6 Propellant at its Camden Facility for an undetermined time period, thereby occupying valuable storage space that is preventing APC from conducting its own business;

WHEREAS, the effective and safe transfer and/or use of the Debtor's M6 Propellant stored at APC's Camden Facility, in compliance with applicable laws and ordinances, is in the best interests of the Debtor, its estate and creditors;

WHEREAS, the Parties have agreed to the Plan regarding the disposition of some or all the Debtor's M6 Propellant that is currently stored at APC's Camden Facility pursuant and subject to the terms set forth in this Stipulated Order;

WHEREAS, the Court, for the reasons stated in open court on March 17, 2014, finds that the benefit to the estate from the transfers authorized by this Order substantially exceeds the consideration of $208,000 originally proposed in the Sale Motion (Doc. #52); and

WHEREAS, the Court specifically finds that the State of Louisiana has not opposed the transfers described in this Order and is not a party in interest to any future transactions involving Debtor's M6 stored at APC's Camden Facility because the M6 dealt with is not in the State of Louisiana and any transfer of same and transportation of same will be by parties duly licensed (not the Debtor);

IT IS HEREBY STIPULATED, ORDERED AND AGREED THAT:

1. As set forth more fully below, the Sale Motion (Doc. # 52) is hereby GRANTED in part and DENIED in part.

2. The Objection (Doc. #101) filed by the United States on behalf of the EPA is hereby WITHDRAWN.

3. Except as specifically set forth herein, APC shall not be deemed to have taken ownership, custody or control of the Debtor's M6 Propellant currently stored at APC's Camden Facility.

4. Subject to the terms of the Plan, the Debtor is hereby authorized to transfer up to 2,600,000 pounds of the Debtor's M6 Propellant currently stored at Austin's Camden Facility, free and clear of all Liens, to APC if APC has arranged for the subsequent transfer (a "Transfer") of the M6 Propellant to Brakefield pursuant to terms agreed upon by and between APC and Brakefield; provided, however, that (x) ownership of such amount(s) of the Debtor's M6 Propellant shall be transferred from the Debtor to APC , free and clear of Liens, immediately prior to the Transfer of the M6 Propellant formerly owned by the Debtor to Brakefield, and (y) the Debtor shall not be entitled to or receive any payment or other form of compensation in connection with the transfer to APC or any subsequent Transfer.

5. The aforementioned portion of this Order shall be effective immediately upon the execution of this Order.

6. Subject to the terms of the Plan, the Debtor is hereby authorized to transfer (in substitution for or in addition to the amounts described in Section 4 above) any of the Debtor's M6 Propellant currently stored at APC's Camden Facility, free and clear of all Liens, to APC if APC has arranged for the subsequent transfer (a "Transfer") of the M6 Propellant to Brakefield or any other properly licensed third-party wishing to obtain all or a portion of the Debtor's M6 Propellant currently stored at Austin's Camden Facility (inclusive of Brakefield, collectively, a "Transferee") pursuant to terms agreed upon by and between APC and such Transferee; provided, however, that (x) ownership of such amount(s) of the Debtor's M6 Propellant shall be transferred from the Debtor to APC , free and clear of Liens, immediately prior to the Transfer of the M6 Propellant formerly owned by the Debtor to a Transferee, (y) the Debtor shall not be entitled to or receive any payment

or other form of compensation in connection with the transfer to APC or any subsequent Transfer, and (z) APC shall not Transfer any of the Debtor's M6 Propellant currently stored at APC's Camden Facility to the Debtor or any "insider" of the Debtor, as such term is defined in section 101 of the Bankruptcy Code.

7. Subject to the terms of the Plan, the Debtor is hereby authorized to transfer to APC for APC's use amounts of the M6 Propellant currently stored at APC's Camden Facility as APC deems appropriate in the preparation of such products (the "Products") that would be sold by APC in its business. Ownership of such amount(s) of the Debtor's M6 Propellant used by APC would be transferred to APC, free and clear of Liens, at the time such M6 Propellant is mixed with other materials to create the aforementioned Products. Prior to such time, the Debtor would retain sole ownership of the M6 Propellant. The Debtor shall not be entitled to, or receive any compensation for (i) any of its M6 Propellant that is incorporated into the Products, and (ii) any Products sold by APC.

8. The Debtor's authority to transfer amounts of the Debtor's M6 Propellant stored at APC's Camden Facility to APC is hereby limited to the amounts necessary for any Transfer and/or use by APC of those Lots (or portions thereof) of the M6 Propellant that (i) have been subjected to the above-referenced Plan, and (ii) registered a satisfactory stability level for Transfer and/or use under the Plan.

9. APC shall provide quarterly reports to the Bureau of Alcohol, Tobacco, Firearms and Explosives, the EPA and the Trustee for the Debtor ("Trustee") providing the updated amount (in lbs.) of the Debtor's M6 Propellant remaining at APC's Camden Facility and of the amount of M6 Propellant transferred to APC for further Transfer or

use. The quarterly reports shall demonstrate compliance with the terms of the stability testing, transportation, and re-use/disposal Plan.

10. This Stipulated Order shall bind the successors and assigns of the Parties, including the Trustee and any trustee appointed under Chapter 7 or 11 of the Bankruptcy Code.

11. The terms of this Stipulated Order shall survive the dismissal or conversion of the Debtor's Chapter 11 case.

12. The Court shall retain jurisdiction to hear and determine all matters arising from the implementation of this Stipulated Order.

13. The United States and APC reserve their rights to seek further relief from this Court.

14. The provisions of Sections 6 and 7 of this Order shall be effective and the transfers described therein allowed if no opposition is filed to the entry of this Order after specific notice is given to the mailing matrix in this case, and no opposition to same is filed within 21 days of such notice. In the event of a timely filed opposition, and only in such event, the hearing on such opposition shall be held at 9:00 a.m. on May 19, 2014.

SEEN AND AGREED:

BLANCHARD, WALKER, O'QUIN & ROBERTS
(A PROFESSIONAL LAW CORPORATION)

/s/ M. Thomas Arceneaux
M. Thomas Arceneaux, LA Bar # 2527
tarceneaux@bwor.com
400 Texas Street, #1400 (71101)
P.O. Drawer 1126 (71163)
Shreveport, LA 71163
Telephone: (318) 221-0685
Facsimile: (318) 227-2967

ATTORNEYS FOR AUSTIN POWDER COMPANY

ROBERT W. RALEY & ASSOCIATES

/s/ Robert W. Raley
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290 Benton Road Spur
Bossier City, LA 71111
Telephone: (318) 747-2230
Facsimile: (318) 747-0106
Rraley52@bellsouth.net

ATTORNEYS FOR EXPLO SYSTEMS, INC., DEBTOR

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UNITED STATES ATTORNEY

By: /s/ Katherine W. Vincent
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JOHN W. LUSTER
CHAPTER 11 TRUSTEE

/s/ John W. Luster
John W. Luster, LA Bar # 09184
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Natchitoches, LA 71457
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